Partnering is a familiar concept now in many construction projects. It has been around for years and is designed to reduce the likelihood of disputes between parties. Stephen Homer takes a look at how partnering works under the NEC and ICE forms of contract.

It is fair to say that Partnering is now an established procurement route for Construction Projects. However the label “Partnering” can still be used to describe a variety of contractual relationships. Usually when people talk about Partnering they are talking about a traditional form of Building or Engineering Contract with a Partnering Charter, the PPC 2000 form of Contract or the Engineering and Construction Contract, (formerly known as the New Engineering Contract), published by the Institution of Civil Engineers.

In this article I would like to take a look at Partnering under the NEC and ICE forms of Contract.

The characteristics of a Partnering Relationship are that it is intended to be open, co-operative and trusting usually with some form of sharing of risk and benefit. The NEC form of Contract embodies several characteristics of the typical partnering relationship. Clause 10.1 states that the parties shall act in a spirit of mutual trust and co-operation. Whilst the enforceability of this clause is questionable, it is a useful statement of intent.

The Contract attempts to persuade the parties to exercise good management by virtue of penalties contained in the Contract terms. For example, by Clause 31 the Contractor is required to submit a very detailed programme showing how he intends to carry out the work and by Clause 50.3 one quarter of the price for the work carried out to date is retained until the first programme
has been submitted. If the Contractor fails to update the
programme
, then by Clause 64.2 the Project Manager assesses any extension of time using his own assessment of the
programme

for the remaining work.

The NEC Contract also provides by Clause 16 that the Contractor and Project Manager should give an early warning as soon as either becomes aware of any matter which could increase the total price, delay completion or impair the performance of the Works in use. A meeting can then be summoned for the making of proposals as to how to avoid or reduce the effect of the matter which has been notified and to seek solutions which will bring advantage to all those who will be affected. By Clause 63.4 it is provided that if the early warning is not given then the Project Manager will assess any compensation event (time or money) as if the Contractor had given the early warning which an experienced Contractor could have given.

Furthermore, option X12, the NEC Partnering Option was published in June 2001. The aim of the Partnering Option is to promote Partnering between more than two parties working on the same project or programme of projects who are not parties to the same Construction Contract. The option is given legal effect by inclusion in each bi-party Contract e.g. between Employer and Contractor by way of an additional clause. In this way the option becomes part of each bi-party Contract and is common to the Contracts between all parties in the project team. Clause X12.1 of the Partnering Option sets out the Option's goal which is that "each Partner works with the others to achieve the Client's objectives stated in the Agreement Data and the objective of each Partner stated in the Schedule of Partners." It is for the parties to determine the objectives and the Partnering Option merely provides a framework into which the detailed provisions must be inserted by the parties in the Schedule of Partners and in the document called The Partnering Information.

The Partnering Option provides for a Core Group which organises and holds meetings and the Core Group acts and takes decisions on behalf of the partners on those matters stated in the Partnering Information document. The Core Group is led by the Client's Representative unless otherwise agreed between the parties and stated in the Partnering Information.

Clause X12.3 of the Partnering Option states that the Partners work together in a spirit of mutual trust and co-operation. It is also provided that each Partner will give an early warning to the other Partners when he becomes aware of any matter which could affect the achievement of another Partners objectives as stated in the Schedule of Partners.

Clause X12.4 provides incentives in that it is stated that a bonus may be paid if a target stated for a key performance indicator is achieved. On the down side if one partner under performs then the whole team may lose their right to the incentive.

The ECC Contract therefore encourages partnering team members to achieve the project objectives through a mechanism of bonuses and penalties which are linked to key performance indicators.

The ICE Conditions of Contract were not drafted as a Partnering Contract. Nevertheless, in common with the NEC Contract, the ICE does provide for transparent pricing of variations and amicable dispute resolution (conciliation in the case of the ICE Contract). A Partnering Addendum to the ICE Contract is currently being prepared and is expected to be published later this year. In the meantime partnering under the ICE Contract is likely to be by way of the addition of a bespoke Partnering Charter which, for example, would include an obligation to act in a spirit of mutual trust and co-operation.

When comparing the NEC and ICE Contracts, it is clear that the NEC supports more clearly the partnering philosophy. The ICE form of Contract provides for transparent pricing of variations and amicable dispute resolution whereas the NEC does both of these and also provides for:

1. an obligation to act with fairness and co-operation,
2. transparent pricing by means of disclosure of the Contractor’s profit,
3. resolving issues as they arise by way of early warning, and
4. pain/gain mechanisms for sharing savings and costs.

Converts of the PPC 2000 form of Contract will argue that the NEC Contract uses stick (by means of the contractual penalties discussed above) rather than carrot to bring about a partnering ethos. Whether this is appropriate in a partnering environment is questionable. However research carried out by Thomas Telford suggest that both Contractor and Employer benefit from using the NEC contract. Certainly the Contractor’s cash flow is protected by the method of valuing and paying all variations as the work goes on and under the NEC Contract the final account dispute appears to be much less likely.

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